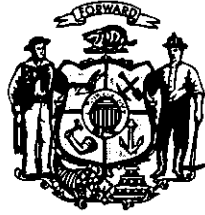


**BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals**



In the Matter of Hazardous Substance Discharges
at the Former National Auto Wrecking Company,
Inc., Salvage Yard Located at 1005 2nd Avenue,
S.W., Onalaska, Wisconsin, on Property Owned by
Charles Ablan and Harriet Karrib

Case No. IH-96-10

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 3, 1996, the Department of Natural Resources (Department) issued Order No. 96-WD-11 to National Auto Wrecking Company, Inc., and Charles Ablan regarding property owned by Charles Ablan and Harriet Karrib. The order required them to conduct an investigation to determine the degree and extent of hazardous substance contamination on the property and to propose and implement remedial action to address any contamination discovered on the property.

On July 25, 1996, the Department received a Petition for Review of Order and Request for Hearing from Attorney William P. Skemp, on behalf of Charles Ablan and National Auto Wrecking Company, Inc. On August 2, 1996, the Department granted the request for a contested case hearing. On August 30, 1996, the Department forwarded the file to the Division of Hearings and Appeals. Pursuant to due notice a hearing was conducted on September 18, 1997, in La Crosse, Wisconsin, before Mark J. Kaiser, Administrative Law Judge. The record was held open to permit Charles Ablan to file a statement in lieu of testimony regarding his opinion of the location of the lot line dividing his property from that of Harriet Karrib. This statement was filed on October 15, 1997.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Charles Ablan and National Auto Wrecking Company, Inc., by

William P. Skemp, Attorney
700 North Third Avenue, Suite 202
P. O. Box 397
La Crosse, Wisconsin 53602-0397

Wisconsin Department of Natural Resources, by

Linda Meyer, Attorney
Joseph Reneville, Attorney
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Applicable Law

Sec. 292.11(3), Stats., provides:

A person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.

FINDINGS OF FACT

1. Charles Ablan owns property located at 1001 2nd Avenue, S.W., Onalaska, Wisconsin (Ablan property) and Harriet Karrib owns property located at 1005 2nd Avenue, S.W., Onalaska, Wisconsin, (Karrib property). The Ablan property and the Karrib property are adjacent to each other. The legal description of these properties is the SE ¼, SE ¼, Section 8 T16 N, R7W, City of Onalaska, La Crosse County, Wisconsin. Charles Ablan had clean fill placed on top of his property. The approximate boundary between the Ablan property and the Karrib property is indicated by the line at which the fill ends.

2. Harriet Karrib is the widow of Louis Karrib. From 1952 until 1964, Charles Ablan operated a salvage yard with Louis Karrib on the Ablan property and the Karrib property. After Louis Karrib's death in 1964, Charles Ablan operated the salvage yard by himself. In 1966, Charles Ablan incorporated the business under the name National Auto Wrecking Company, Inc. Charles Ablan is the president and sole shareholder of National Auto Wrecking Company, Inc. National Auto Wrecking Company, Inc., leased the Karrib property from Harriet Karrib from 1966 to 1994 and continued the salvage yard operation on the two properties until the spring of 1994.

3. Although the corporation has not been dissolved, National Auto Wrecking Company, Inc., discontinued the salvage business in 1994. The Ablan property is currently leased by Harter's Quick Clean-Up Service.

4. Prior to the discontinuance of the salvage business, operations of National Auto Wrecking Company, Inc., conducted on the site included the salvaging of automotive batteries, transformers, underground petroleum storage tanks, and junked automobiles.

5. On June 7, 1994, Department of Natural Resources (Department) staff inspected the site in the presence of Ms. Karrib and Mr. Ablan. Broken pieces of batteries and lead plates,

transformer insulators, and burned electrical wire were observed by the Department staff on the site. These materials resulted from the battery cracking operations and transformer salvage work done by employees of National Auto Wrecking Company, Inc. Mr. Ablan also indicated that an underground diesel fuel tank was located under a concrete pad on the site. Mr. Ablan noted that the tank was no longer being used because it leaked.

6. On December 28, 1994, Department staff collected soil samples on the Karrib property. The samples were tested at the State Lab of Hygiene, for polychlorinated biphenyls (PCBs) and lead. Three surficial soil samples were collected at the following locations: field sample #1, collected at a pile of salvage scrap just inside the entry gate on the west side of the Karrib property; field sample #2, collected at a location containing transformer components, on the northeast corner of the Karrib property; and, field sample #3, collected within a location containing crushed battery cases on the east side of the Karrib property. Laboratory analysis revealed low levels of PCBs in the soil samples and lead concentrations above the soil cleanup standards established in ch. NR 720, Wis. Adm. Code. Visual observations by Department staff of waste materials lying on the surficial soils in the vicinity of the railroad tracks, near on-site buildings, and in the vicinity of a large metal structure (burn shed) suggested potential contamination from other salvage operations conducted on the property.

7. Braun Intertec Corporation (Braun), an environmental consulting firm, conducted a site investigation on the Karrib property in the fall of 1996 and prepared a report, dated October 14, 1996. The Braun report concluded that: "The previous salvage yard operations appear to have impacted soil and groundwater at the site." Braun found petroleum and lead contaminated soils at levels above ch. NR 720, Wis. Adm. Code, residual contaminant levels (RCLs) in the battery cracking area, the engine storage area and the burn shed area. Braun also found petroleum-related constituents in the groundwater at the site at concentrations above ch. NR 140, Wis. Adm. Code, groundwater quality standards.

8. On June 12, 1995, Department staff collected soil samples from the Ablan property. The samples were analyzed at the State Laboratory of Hygiene, for certain organic and inorganic contaminants (PCBs, arsenic, cadmium, lead and mercury). Three of the four samples that were collected at the site had high levels of total lead that exceeded the 500 mg/kg RCL established in ch. NR 720, Wis. Adm. Code. Toxicity Characteristic, Leaching Procedure (TCLP) tests were also performed on the samples to determine if the soil would be regulated as a hazardous waste because of its lead content if the soil were excavated. The TCLP tests revealed that two of the four samples exceeded the sec. NR 605.08(5), Wis. Adm. Code, toxicity level of 5 mg/liter for lead (with TCLP test results of 170 mg/liter and 29 mg/liter). Low levels of mercury, cadmium and PCBs were also detected in some of the samples.

9. On July 3, 1996, the Department issued an enforcement order directing National Auto Wrecking Co., Inc., and Charles Ablan to conduct an adequate investigation and cleanup of the site (both the Ablan property and the Karrib property).

10. On January 14, 1997, Braun collected soil samples from eight soil borings (ST-1 through ST-8) on the Ablan property. Borehole groundwater samples were also collected by Braun from three of the eight borings on that date. Laboratory analysis revealed petroleum and

heavy metal contamination in several of the samples. Diesel-range organic (DRO) compounds were detected in the soil samples from boring ST-4 in concentrations that exceeded the generic RCLs established in ch. NR 720, Wis. Adm. Code. Total lead concentrations in soil samples from ST-2, ST-4 and ST-8 were also above RCLs that were established to protect human health from the threat of direct contact with the contaminants. Analysis of groundwater samples from the site showed that the samples from ST-1 and ST-8 contained dissolved lead at levels above the ch. NR 140, Wis. Adm. Code, enforcement standard (ES) and the sample from ST-4 showed that the sample contained DRO compounds at levels above the ch. NR 140, Wis. Adm. Code, ES.

11. The generic RCLs established in sec. NR 720.09, Wis. Adm. Code, are concentrations that can be expected to migrate through the soil to the groundwater, causing groundwater contamination that will exceed ch. NR 140, Wis. Adm. Code, groundwater quality standards. Responsible parties have the option of calculating a site-specific RCL if they believe that conditions at their site are not typical and would result in less of an impact to groundwater than would otherwise be expected. However, in the absence of a site-specific RCL, the generic RCLs set forth in ch. NR 720, Wis. Adm. Code, legally establish the required cleanup levels.

12. Braun has submitted to the Department a report entitled "Preliminary Site Investigation Report for Charles Ablan," dated February 28, 1997. In the report, Braun recommends that a risk assessment be performed for the site, that an additional soil boring investigation be conducted to delineate the lateral extent of lead and petroleum compounds in the soil, and that a groundwater monitoring well network be installed to further evaluate the magnitude and extent of lead contamination in the groundwater and to delineate site-specific hydrogeologic conditions.

13. On March 28, 1997, Jack Eslien (Environmental Repair Specialist in the Department's West Central Region) issued a letter in which he listed the areas where the Braun report was deficient, and in which he requested that Mr. Ablan submit to the Department a draft scope of work for the more intensive investigation that Braun had recommended. Mr. Eslien concluded, based on the results of sampling conducted by the Department and the results of sampling conducted by Braun on Mr. Ablan's property, that hazardous substances are continuing to migrate (i.e., discharge to the environment) on the site.

14. Charles Ablan and National Auto Wrecking Company, Inc., are responsible parties for the hazardous substance contamination which exists on the Ablan property.

15. Charles Ablan has not submitted a work plan to the Department for additional investigation or remediation of the Ablan property. Mr. Ablan's attorney has informed Department staff that the most recent report that Mr. Ablan received from Braun indicates that the cost of any cleanup of his property will far exceed its value. Mr. Ablan is not willing to proceed any further with the investigation or cleanup of the site because Mr. Ablan does not believe that it is either necessary or reasonable to expect him to pay more for investigating and cleaning-up the contamination than the property is worth.

16. Charles Ablan and National Auto Wrecking Company, Inc., are not responsible parties for the hazardous substance contamination which exists on the Karrib property.

Discussion

At the close of the hearing, the Department withdrew Order No. WD 96-11 and filed proposed Orders Nos. 97-WCEE-004A and 95-WCEE-004B. Order No. 97-WCEE-004A relates to the Ablan property and Order No. 95-WCEE-004B relates to the Karrib property. With respect to Order No. 97-WCEE-004A, Charles Ablan does not dispute that his property contains hazardous substances and he is responsible for remediation of the property. However, he argues that the portion of the order requiring further investigation of the degree and extent of the contamination is unreasonable. The basis for this argument is that the cost of the ordered investigation exceeds the value of the property.

As a responsible party, Mr. Ablan is required to "take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state." No standard exists that the cost of hazardous substance investigation and remediation is limited to the fair market value of the subject property or that it be economically feasible. The court of appeals addressed this issue indirectly in a case in which a landowner was seeking compensation from a bank for the costs of remediation allegedly resulting from the bank's negligence.

The court of appeals stated, in response to the bank's argument that any compensatory damages due the landowner were limited to the diminution in value of the property resulting from the hazardous substance discharge, that "assuming the bank was the negligent cause of the leak, its negligence has made [the landowner] legally obligated to incur costs to restore her property. These [costs] are recoverable as the normal measure of compensatory damages, despite the fact such expenses may exceed the diminution in fair market value." Nischke v. Farmers & Merchants Bank, 187 Wis.2d 96, at 120, 522 N.W.2d 542 (Ct.App. 1994). Similarly, the amount a landowner may be required to pay for investigation and remediation of hazardous substance contamination is not limited by the fair market value of the property.

Mr. Ablan also argues that passive bioremediation is adequate to remediate his property. It is possible that once the degree and extent of the contamination is known, passive bioremediation will be determined to be an adequate method for remediation. However, until a complete investigation of the property is accomplished, one can not determine which, if any, remediation method is reasonable. The requirements of the Department's proposed Order No. 97-WCEE-004A are reasonable and are incorporated into the order below.

With respect to Order No. 97-WCEE-004B, Mr. Ablan argues that he is not the owner of the Karrib property and should not be held responsible for remediation of this property. There is no evidence of any ongoing human activity causing a discharge of any hazardous substances at the site. However, the Wisconsin Supreme Court has held that the legislature intended to define the word "discharge" in sec. 292.11(3), Stats., broadly. The word "discharge" includes the seepage of hazardous substances from contaminated soils into neighboring properties. State v. Mauthe, 123 Wis 2d 288, at 299, 366 N.W.2d 871 (1985).

In situations where there is no ongoing human activity, sec. 292.11(3), Stats., imposes a duty to clean up on a person who possesses or controls a hazardous substance which was

discharged even though that person did not cause the discharge. Mauthe, at 300. The duty to clean up soil contaminated by a hazardous substance attaches to ownership of the land. Foss v. Madison Twentieth Century Theaters, 203 Wis.2d 210, 551 N.W.2d 814 (Ct.App. 1996). Neither National Auto Wrecking Company, Inc., nor Mr. Ablan owns the Karrib property and, therefore, can not be found to be a "person" who controls or possesses the hazardous substances located on the Karrib property. Nor is there any evidence in the record indicating that the hazardous substances located on the Karrib property are migrating from the Ablan property so that one could find that Charles Ablan possesses or controls a hazardous substance which is discharging unto the Karrib property. Neither National Auto Wrecking Company, Inc., nor Mr. Ablan is a responsible party with respect to the contamination on the Karrib property.

In its opening statement, the Department indicated that it has a policy to pursue the person who caused contamination before going after an innocent landowner. This does not appear to be a situation in the instant case. Although undoubtedly some of the contamination on the Karrib property is the result of the activities of the employees of National Auto Wrecking Company, Inc., Louis Karrib was a partner of Charles Ablan in the auto salvage business until his death in 1964. Some of the contamination presumably is also the result of activities which occurred while Louis Karrib was involved in operating the salvage business. Additionally, after Louis Karrib's death, Mr. Ablan and National Auto Wrecking Company, Inc., continued to lease the Karrib property for the business. Harriet Karrib presumably was aware of the activities being conducted on her property and profited from them.

CONCLUSIONS OF LAW

1. Charles Ablan and National Auto Wrecking Company, Inc., are not responsible parties with respect to the Karrib property and that portion of the Department's order which relates to the Karrib property should be dismissed.
2. Lead, diesel fuel and its constituents are "hazardous substances" as defined in sec. 292.01(5), Stats.
3. Charles J. Ablan, as owner of the Ablan property, has possession and control of hazardous substances that are continuing to discharge and he has the responsibility under sec. 292.11(3), Stats., to take the actions that are necessary to restore the environment to the extent practicable and to minimize the harmful effects from the discharge to the air, land or waters of the State.
4. The following order is reasonable and necessary to accomplish the purposes of sec. 292.11, Stats., and is enforceable through prosecution by the Attorney General under sec. 299.95, Stats., and ch. NR 728, Wis. Adm. Code.
5. Pursuant to sec. 227.43, Stats., the Division of Hearings and Appeals has the authority to issue the following order.

ORDER

1. Charles J. Ablan shall not allow any use of the property which would expose an occupant or the public to contamination on the property located at 1001 2nd Avenue, S.W. Onalaska, Wisconsin (Ablan property).
2. Charles J. Ablan shall, within twenty (20) calendar days after the effective date of this order, submit a work plan to the Department for a site investigation that complies with all of the requirements of ch. NR 716, Wis. Adm. Code (including the items listed in Jack Eslien's letter dated March 28, 1997), to determine the degree and extent of soil and groundwater contaminant on Ablan property, including any contaminants that have migrated from the Ablan property to other properties.
3. The Department shall review the site investigation work plan and will provide Mr. Ablan with a deadline for submitting a revised work plan should one be required.
4. Charles J. Ablan shall implement the site investigation work plan approved by the Department in compliance with the schedule that has been approved as part of the work plan. Once the site investigation is completed, Charles J. Ablan shall have sixty (60) calendar days to submit a site investigation report and a proposed remedial action plan to the Department. The investigation report shall satisfy the requirements in sec. NR 716.15, Wis. Adm. Code. The remedial action plan shall be submitted in compliance with the requirements of ch. NR 722, Wis. Adm. Code.
5. After a remedial action plan for the Ablan property is approved by the Department, Charles Ablan shall implement the approved remedial action in compliance with ch. NR 724, Wis. Adm. Code. Unless otherwise directed by the Department, Mr. Ablan shall have thirty (30) calendar days, after receiving approval from the Department, in which to begin the remediation approved by the Department.
6. The Department has the right to amend or supplement this order by issuing a subsequent administrative order, if such action is necessary for the protection of public health, safety or welfare, or the environment. If the Department issues a subsequent order to Charles Ablan, he has the right to contest the provisions of the new order under ch. 227, Wis. Stats.
7. Based on the foregoing Findings of Fact and Conclusions of Law, Charles Ablan and National Auto Wrecking Company, Inc., shall not be required to conduct any

investigation or perform any remediation on the Karrib property except with respect to any contaminants that are determined to have migrated from the Ablan property to the Karrib property.

Dated at Madison, Wisconsin on November 5, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.